No. 93-571

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# In the Supreme Court of the United States

OCTOBER TERM, 1993

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NDUCHE CHIMA UWAEZHOKE, AKA ANDY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the prosecutor provided a racially neutral, non-pretextual explanation for exercising a peremptory challenge against a black prospective juror.

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### OPINION BELOW

The opinion of the court of appeals (Pet. Supp. App. 1-32) is reported at 995 F.2d 388.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 6, 1993. A petition for rehearing was denied on June 11, 1993. Pet. App. 3a-4a. The petition for a writ of certiorari was not filed until October 6, 1993, and it is therefore substantially out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to import heroin and to possess heroin with intent to distribute it (21 U.S.C. 963 and 846), importing heroin (21 U.S.C. 960), and possessing heroin with intent to distribute it (21 U.S.C. 841(a)(1)). Petitioner was sentenced to 216 months' imprisonment. The court of appeals affirmed. Pet. Supp. App. 1-32.

1. The evidence, which is summarized in the government's brief in the court of appeals, showed that co-defendant Tony Butts was arrested by federal officers at Newark International Airport while carrying a false-bottom suitcase containing heroin that Butts had imported from Japan.[1] Agreeing to cooperate, Butts identified petitioner as the intended recipient of the heroin and made a series of telephone calls to arrange a controlled delivery of the heroin to petitioner at a Chicago airport. Petitioner was subsequently arrested when he took possession of the suitcase. In a later warrant-authorized search of petitioner's apartment, officers found a second false-bottomed suitcase, assorted drug paraphernalia, $50,000 in cash, and an automatic pistol. Trained dogs alerted to the presence of drug residue on both the suitcase and the cash found in petitioner's apartment. Gov't C.A. Br. 2, 5-6.

2. During jury selection, the government used its first peremptory strike to remove a white prospective

[1] Butts pleaded guilty to a substantive importation count and testified against petitioner at trial.

juror. C.A. Supp. App. 44-45; Gov't C.A. Br. 3.[2] After defense counsel exercised a peremptory challenge during the fifth round of strikes, prospective juror Kim Lucas, a black woman, was called as a replacement juror. During her *voir dire* examination, juror Lucas stated that she had been a postal worker for four years; that she was an unmarried, single parent of two small children; that she rented her place of residence;[3] that she was a high school graduate who was attending college; and that her interests included aerobics, cutting hair, and tennis. C.A. Supp. App. 52; Gov't C.A. Br. 3. The government then used its second peremptory challenge to remove Lucas from the panel. C.A. Supp. App. 52.

Defense counsel objected, asserting that "this is obviously racial. People sat in that seat time and again. Everyone was approved. The moment a black sits down there is a targeted thrust at that particular person." C.A. Supp. App. 53. When the court inquired as to the basis for the government's challenge, the following exchange occurred (C.A. Supp. App. 53-54):

> MR. TANNENBAUM: We challenged her because it's a general policy. She was a postal employee, and we usually just generally don't like to have postal employees on the jury. It

[2] "C.A. Supp. App." refers to the supplemental appendix that accompanied the government's brief in the court of appeals.

[3] The roster of prospective jurors showed that Lucas lived in Newark.

has nothing to do with any racial—

[DEFENSE COUNSEL]: Judge, I've tried cases in this courthouse for a long time. If that is a new policy to challenge postal authorities, that is a brand new policy.

* * * * *

THE COURT: Are you stating?

MR. REPETTO: It's not a policy.

MR. TANNENBAUM: No, it's not a policy per se.

* * * * *

THE COURT: I want to know why you challenged this particular juror.

MR. REPETTO: This particular juror is employed by the Postal Service. There is a problem with Postal Service jurors in these kinds of cases. It is a person [who] is a single parent, it's also a person that rents, it's a person that may be involved in a drug situation where she lives.

There is a lot going to this other than the fact that she

> is black, and there is a black juror on [the panel] that nobody touched.

The court accepted the government's explanation for its challenge of juror Lucas. C.A. Supp. App. 54. In so doing, the court noted "that Juror No. 4 [Paul Ferguson] is black and has not been challenged throughout." C.A. Supp. App. 55. Jury selection was completed without any further challenges by the government, and juror Ferguson served on the jury empaneled for petitioner's trial.

3. The court of appeals affirmed petitioner's conviction, with one judge dissenting. Without deciding whether the government's use of a peremptory challenge to strike a single black juror constituted *prima facie* evidence of a racially discriminatory purpose (Pet. Supp. App. 7-8),[4] the court held that the explanation offered by prosecutor Repetto for the government's challenge of juror Lucas was "valid" as it was "clearly race-neutral on its face." Pet. Supp. App. 10, 12. As the court of appeals explained (Pet. Supp. App. 10):

> The prosecutors, at the time they exercised the peremptory challenge, knew that Ms. Lucas was a single parent of two children who was making the salary of a postal worker with four years of seniority and renting an apartment in Newark, New Jersey. It is, we believe, fair to infer that the

[4] As the court of appeals stated, the threshold issue as to whether a *prima facie* showing of discriminatory motivation was made became moot once the prosecutors offered an explanation for their exercise of the peremptory strike. Pet. Supp. App. 7-8.

> prosecutors, in the absence of any more detailed information concerning Ms. Lucas, speculated that she might live in low income housing in Newark. Having so speculated, the prosecutors inferred that Ms. Lucas was more likely to have had direct exposure to drug trafficking than someone who did not live in low-income housing in Newark. While this conclusion may or may not be empirically correct, we cannot say that it exhibits racially discriminatory intent as a matter of law.

The court of appeals further found "credible record evidence that logically support[ed]" the conclusion that the explanation offered by the government was not pretextual. Pet. Supp. App. 12. Thus, the court of appeals noted, prosecutor Repetto's tender of "a racially neutral explanation that was plausible * * * was buttressed by the fact that the government had earlier had repeated opportunity to challenge the black juror who in fact served on [petitioner's] jury, and declined to do so." *Ibid.*

District Judge Pollak, sitting by designation, dissented. In Judge Pollak's view, "the postal-worker explanation [was] deficient as a matter of law," Pet. Supp. App. 17, but the record was unclear as to whether the district court relied on that explanation to any extent in denying petitioner's *Batson* claim. Pet. Supp. App. 17, 22-23. Judge Pollak further stated that in his view the explanation pertaining to juror Lucas's residence in a high-crime area, albeit racially neutral on its face, would have a disparate impact on minority jurors in practice. Pet. Supp. App. 24-26. As such, Judge Pollak believed that the case should have been remanded so that the district court could reex-

amine the reasons proffered by the government for challenging juror Lucas. Pet. Supp. App. 29.

## ARGUMENT

Petitioner contends that the courts below erred in finding that the prosecutors offered a racially neutral, non-pretextual explanation to justify their exercise of a peremptory challenge to remove prospective juror Lucas from the jury panel.

This Court held in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), that the Equal Protection Clause bars a prosecutor from exercising peremptory challenges based on race. The Court also formulated a three-part evidentiary standard for establishing the existence of racial discrimination in the use of a peremptory challenge: the defendant must make a *prima facie* showing that the prosecutor's peremptory challenge was based on race, 476 U.S. at 96-97; if the defendant makes that showing, the burden shifts to the prosecutor to provide a race-neutral reason for the challenge, *id.* at 97-98; and the trial court "then will have the duty to determine if the defendant has established purposeful discrimination," *id.* at 98. The trial court's determination of that issue is entitled to "great deference" by a reviewing court, *id.* at 98 n.21, and may be reversed only if it is "clearly erroneous." *Hernandez* v. *New York*, 111 S. Ct. 1859, 1869 (1991).

*Batson* requires only that a peremptory strike not be based on race; "the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause." *Hernandez*, 111 S. Ct. at 1868 (plurality opinion). See also *Batson*, 476 U.S. at 97 ("emphasiz[ing] that the prosecutor's explanation need not rise to the level justifying exercise of a

challenge for cause"). Thus, as was explained in *Hernandez*, 111 S. Ct. at 1866 (plurality opinion), "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

In this case, the prosecutors' reasons for their peremptory strike of prospective juror Lucas, as elaborated upon by prosecutor Repetto, were clear, specific, and racially neutral, as *Batson* requires. See 476 U.S. at 98 & n.20. Thus, in enlarging on prosecutor Tannenbaum's statement that there was an informal "policy" of generally excluding postal employees from the jury, prosecutor Repetto stated that postal employees posed a "problem * * * in these kinds of cases," and that, as a single parent who resided in a rental unit in Newark, Lucas constituted "a person that may be involved in a drug situation where she lives." C.A. Supp. App. 53-54.

Courts of appeals have upheld the adequacy of similar explanations that focus on a prospective juror's youth, marital and parental status, economic circumstances, or other demographic circumstances that might engender a more sympathetic attitude toward the accused. See, *e.g.*, *United States* v. *Pofahl*, 990 F.2d 1456, 1465-1466 (5th Cir. 1993) (low wage earners); *United States* v. *Clemons*, 941 F.2d 321, 325 (5th Cir. 1991) (age); *United States* v. *Nichols*, 937 F.2d 1257, 1263-1264 (7th Cir.) (young, single mothers), cert. denied, 112 S. Ct. 989 (1992); *United States* v. *Williams*, 934 F.2d 847, 849-850 (7th Cir. 1991) (young, single mother); *United States* v. *Prine*, 909 F.2d 1109, 1113 (8th Cir.) (young, unmarried persons who might be more likely to live in a social environment with a liberal attitude toward drugs), cert. denied, 111 S. Ct.

1318 (1991); *United States* v. *Dawn*, 897 F.2d 1444, 1448 (8th Cir.), cert. denied, 498 U.S. 960 (1990) (youth); *United States* v. *Mitchell*, 886 F.2d 667, 671-672 & n.2 (4th Cir. 1989) (youth); *United States* v. *Moreno*, 878 F.2d 817, 820 (5th Cir.), cert. denied, 493 U.S. 979 (1989) (young, single, unemployed); *United States* v. *Clemons*, 843 F.2d 741, 748 (3d Cir.), cert. denied, 488 U.S. 835 (1988) (young and single). Accordingly, the court of appeals was correct in observing that the collective explanation advanced by the prosecutors did not "exhibit[] racially discriminatory intent as a matter of law." Pet. Supp. App. 10.[5]

The court of appeals properly upheld the district court's finding in this case that the prosecutors' explanation for their exercise of a peremptory challenge against juror Lucas was non-pretextual and free of discriminatory purpose. The determination that a prosecutor's reasons are non-discriminatory essentially rests on a finding of credibility, an issue as to which "[t]here will seldom be much evidence," and as to which "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Hernandez*, 111 S. Ct. at 1869 (plurality

[5] Although the challenge of juror Lucas was based largely on intuitive assumptions that the prosecutors drew from a combination of factors, the rule in *Batson* does not prohibit that kind of subjective judgment on the part of prosecutors. See *United States* v. *Bentley-Smith*, 2 F.3d 1368, 1374 & n.6 (5th Cir. 1993) (collecting cases); *Williams*, 934 F.2d at 850. Indeed, the prosecutors' explanation would have been facially sufficient had it focused only on the challenged juror's employment. See *United States* v. *Romero-Reyna*, 889 F.2d 559, 560-561 (5th Cir.) (prosecutor's systematic exclusion of any juror whose occupation began with the letter "P"), cert. denied, 494 U.S. 1084 (1990).

opinion). In this case, however, there was more than just the district court's assessment of the prosecutors' credibility in asserting a non-racial purpose in striking juror Lucas: there was persuasive objective evidence supporting the district court's finding that the prosecutors had no intention to discriminate on account of race when they struck Lucas. As the court of appeals pointed out, before striking Lucas the prosecutors "earlier had repeated opportunity to challenge the black juror who in fact served on [petitioner's] jury, and declined to do so." Pet. Supp. App. 12. See *United States* v. *Mixon*, 977 F.2d 921, 923 (5th Cir. 1992); *United States* v. *Alvarado*, 951 F.2d 22, 26 (2d Cir. 1991); *Nichols*, 937 F.2d at 1264; *United States* v. *Joe*, 928 F.2d 99, 103 (4th Cir.), cert. denied, 112 S. Ct. 71 (1991); *United States* v. *Grandison*, 885 F.2d 143, 148 (4th Cir. 1989). In such circumstances, there is simply no basis for the Court to second-guess the trial court's conclusion that the prosecutors' motive in challenging prospective juror Lucas was not racially motivated.

The decision below does not conflict with the holding in *United States* v. *Bishop*, 959 F.2d 820 (9th Cir. 1992). In *Bishop*, the prosecutor used a peremptory challenge to remove a minority member of the venire because she was a welfare eligibility worker who resided in a predominantly black community, in which a negative attitude toward police officers was likely prevalent. Focusing on the aspect of residency, the court of appeals held that the prosecutor's explanation was impermissible under *Batson*, since it could be used to justify the striking of any minority prospective juror who might reside in a low-income neighborhood. Citing *Hernandez*, the *Bishop* court

stated that residency could be used to justify the exercise of a peremptory challenge only "[w]here residence is utilized as a link connecting a specific juror to the facts of the case." 959 F.2d at 826. Unlike in *Bishop*, juror Lucas was not struck simply because she resided in a low-income neighborhood. Rather, the prosecutors cited Lucas's age, her status as a young, unwed mother, and her employment and economic status as suggesting that as a juror she might be less favorably inclined toward the government.[6] As we have noted, such explanations have been accepted as adequate for purposes of *Batson*, and nothing in *Bishop* challenges that proposition. Nor did the court in *Bishop* require that the government must always establish a nexus between the reason for the exercise of a peremptory challenge and the facts of the particular case on trial in order to satisfy the requirements of *Batson*. The court merely indicated that where the explanation offered touches racial or ethnic stereotyping—like the residency explanation in *Bishop* or the Spanish-speaking juror in *Hernandez*—a nexus between the reason and the facts of the case must be offered. That rationale does not extend to the explanation provided here.

[6] In *Bishop*, the prosecutor also noted the challenged juror's age and employment as a welfare eligibility worker as reasons for seeking her removal. However, the court discounted those reasons because other jurors of similar age and employment were not struck. 959 F.2d at 827. Thus, the challenge in *Bishop* was explainable only in terms of residency.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1993